

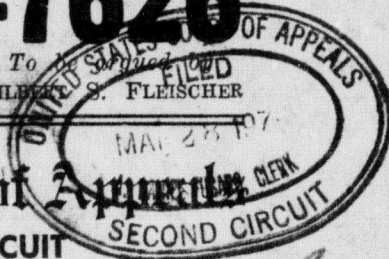
***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-6219
77-7626

To be submitted to
GILBERT S. FLEISCHER



United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket Nos. 77-6219, 77-7626

MARSHALL P. SAFIR,

—against—

Plaintiff-Appellant,

**ROBERT J. BLACKWELL, Assistant Secretary for Maritime
Affairs, United States Department of Commerce, et al.,**
Defendants-Appellees.

**UNITED STATES OF AMERICA, ex rel. MARSHALL P.
SAFIR and MARSHALL P. SAFIR,**

—against—

Plaintiffs-Appellants,

AMERICAN EXPORT LINES, INC., et al.,

Defendants-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

**BRIEF FOR UNITED STATES OF AMERICA ON BEHALF
OF APPELLEES ROBERT J. BLACKWELL, ASSISTANT
SECRETARY FOR MARITIME AFFAIRS, UNITED
STATES DEPARTMENT OF COMMERCE, ET AL.**

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UNITED STATES OF AMERICA, ex rel. MARSHALL P. SAFIR
and MARSHALL P. SAFIR,
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—against—

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**BRIEF FOR UNITED STATES OF AMERICA ON BEHALF
OF APPELLEES ROBERT J. BLACKWELL, ASSISTANT
SECRETARY FOR MARITIME AFFAIRS, UNITED
STATES DEPARTMENT OF COMMERCE, ET AL.**

Statement of the Case

Marshall P. Safir, plaintiff/appellant, hereby appeals from an order of Judge John F. Dooling, United States District Judge, Eastern District of New York, entered on December 20, 1977, denying plaintiff's motion to amend the complaint in 68 CIV 643 and consolidate the

action with a newly commenced action, 77 CIV 1093. The amendment seeks to add a new claim under the False Claims Act (FCA), 31 U.S.C. 231, *et seq.*

On or about June 24, 1968, plaintiff filed a complaint (App. 62)¹ in 68 CIV 643 against the Acting United States Maritime Administrator, the Secretary of the Maritime Subsidy Board, and the Secretary of Commerce to compel them to cease payment of certain differential subsidies to various steamship companies who it alleged were violating Section 810 of the Merchant Marine Act, 1936, 46 U.S.C. 1227, by using unfair rate competition against plaintiff. By this action plaintiff further sought an order compelling defendants to take appropriate legal action to recover subsidies paid since March 29, 1965. The steamship lines were all members of the Atlantic and Gulf American Flag Berth Operators (AGAFBO).² A judgment was entered in this 1968 proceeding on September 17, 1970 mandating that the Maritime Administration decide the issues of recovery of subsidies paid to the offending carriers. Ultimately, the Secretary of Commerce rendered a decision providing for the recoupment of approximately \$1.1 million in subsidies from certain members of AGAFBO for the period of violation.

In May, 1977, Mr. Safir commenced another proceeding entitled *United States ex rel. Safir v. American Export Lines, et al.*, 77 CIV 1093, in the Eastern District of New York. This 1977 proceeding was begun on behalf of the United States as a *qui tam* action allegedly having jurisdiction under the Federal False Claims Act,

¹ "App." and "no." refers to Appendix and page.

² American Export Isbrandtsen Lines, Inc., American President Lines, Ltd., Bloomfield Steamship Company, Farrell Lines Incorporated, Grace Line, Inc., Lykes Bros. Steamship Co., Inc., Moore-McCormack Lines, Inc., Prudential Steamship Corporation, and United States Lines Company.

31 U.S.C. 231, *et seq.* Defendants have answered this complaint and the United States has filed a Declination of Appearance dated June 21, 1977 (App. 172).

On September 13, 1977, Mr. Safir served defendants with a Notice of Motion to consolidate this latest *qui tam* proceeding with his earlier 1968 proceeding and to amend his complaint in the 1968 proceeding to include a new claim under the False Claims Act, 31 U.S.C. 231, *et seq.* Defendants in 77 CIV 1093 moved by way of summary judgment for a dismissal of the action against them. Judge Dooling in his order denying plaintiff's motion to consolidate and amend also granted defendants' motion for summary judgment dismissing the complaint in 77 CIV 1093. The ruling on this latter motion is also now on appeal. Both actions are consolidated for purposes of appeal only.

The United States having opposed below only the motion for consolidation of the two actions and the motion to amend the complaint in 68 CIV 643, addresses its arguments in this appeal to those two points only. For a full review of the cases and events leading to these motions, reference is made to Judge Dooling's very comprehensive summary found in his memorandum and order. (App. 1).

Questions Presented

1. Whether the District Court properly ruled that plaintiff's amendment would add a completely new claim both as to substantive content and as to the identity of the persons against whom relief was sought and therefore may not be allowed under Rule 15c of the Federal Rules of Civil Procedure.
2. Whether amendments of this 1968 action (68 Civ. 643), inactive for over six years and barred by

limitations, would prove to be an exercise in futility and therefore should not be permitted.

ARGUMENT

I

The amendments to the 1968 complaint fail to meet the "relation back" test.

Plaintiff states in Paragraph 6 of his moving affidavit (App. 39) that he "understands that amendments adding additional claims for damages have uniformly been held to relate back and not to introduce new causes of action." This oversimplified statement is not the law.

The federal rule in this regard is covered by Rule 15(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. which provides:

"(c) Relation Back of Amendments. Whenever the claim or defence asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. . . ."

Applying this rule it should be evident that the amendments proposed by Safir are for the purpose of adding an entirely new cause of action under the False Claims Act, 31 U.S.C. 231-235, which has nothing to do with the original challenge pleaded.

The original action was under 46 U.S.C. 1227, seeking a declaration that any subsidy payment during the predatory period violated Section 1227, seeking to enjoin such payments, and seeking to command an action to recover such payments. The amendments, however, seek a

declaration that the shipowners violated the FCA by indenting for subsidy money *as well as* violating the 1936 Act by their unfair competition (prayers A and B of the proposed amended complaint, App. 58, 59); seek to order the federal defendants to declare the shipowners in default of their operating differential subsidy agreements (prayer C, App. 59); seek an order commanding federal defendants to attach shipowners' assets, such as capital construction accounts, bonds, and sureties (prayer D, App. 59), an order commanding federal defendants to offset the subsidy falsely claimed against all unpaid accrued subsidies (prayer E, App. 59), and an order commanding the federal defendants to withhold all current subsidy payments (prayer F, App. 59). Not only does this amendment seek to relitigate under the guise of the FCA matters which have been settled under the 1936 Act, it is a completely different theory of recovery under a completely different statutory scheme with completely different species of violative conduct and methods of recovery in completely different forums (the Secretary of Commerce under the 1936 Act, the Courts under the FCA). *United States v. Templeton*, 199 F. Supp. 179 (E.D. Tenn. 1961).

In *United States v. Templeton*, *supra*, the Court held "that there was a diversity, rather than an identity, with regard to the wrong suffered and the conduct causing such wrong," and therefore ruled the amendment would not relate back (p. 184).

Nor does the proposal relate back to the shipowner defendants at all. No relief was ever sought by Safir against the shipowners, to which these amendments might possibly relate back. It must be recalled that the shipowners were not made parties in the original complaint filed in 68 CIV 643. They intervened only after the Second Circuit expressed concern that they should be in the action "to protect their interests." (footnote 4, p. 976

in *Safir v. Gibson*, 417 F.2d 972 (2d Cir. 1969)).³ As a matter of fact, Safir is here stating a brand new cause of action which he had already pleaded in 77 CIV 1093, as to the shipowner defendants, pending in this District. It is in that action alone he can obtain his remedy, if there be one, and not in 68 CIV 643.

II

To permit amendment would be to permit futility.

The liberal amendment rules of Federal Rules of Civil Procedure 15(a) do not require that courts indulge in futile gestures. Where a complaint, as amended, would be subject to dismissal, leave to amend need not be granted. *Foman v. Davis*, 371 U.S. 178 (1962).

As to the federal defendants in 68 CIV 643, the matter is *res judicata*. Not only does Safir's new theory not relate back, it is an attempt in a new guise to litigate the issues which are now settled under the 1936 Act. Unless the Supreme Court reverses both the Second and D.C. Circuits, both courts have declared that the Secre-

³ "The defendants also moved to dismiss the complaint for improper venue and for failure to join indispensable parties, or, in the alternative, for a transfer to the District of Columbia under 28 U.S.C. § 1404(a). The court below found it unnecessary to pass on these points in view of its holding that the complaint failed to state a cause of action. While the parties have not discussed in this court whether the AGAFBO lines were required to be joined as defendants, we are concerned that disposition of the action in their absence 'may * * * as a practical matter impair or impede' their ability to protect their interests in the subject matter of this litigation. F.R.Civ.P.19. Accordingly, if the district court should require their joinder or if they should intervene, we would not wish the district court to feel that anything said in this opinion precludes its considering any new arguments which the AGAFBO lines may bring to its attention."

tary has the discretion to mitigate subsidy recovery.⁴ It therefore follows that a claim for more than that amount is not false. Perhaps this is more the law of the case than *res judicata*, but either way *Safir as to the federal defendants* is attempting to open closed doors. This relates to prayers A, B, C, E and F of the proposed amended complaint. (App. 58, 59).

Prayer D would require the Secretary to attach ship-owners' funds and sureties in his hands. This is an obvious garnishment action, to which the United States has never consented. The Secretary cannot be required to become *Safir's* collection agency, bondsman, or stakeholder.

"So long as money remains in the hands of a disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury." *Buchanan v. Alexander*, 45 U.S. (4 How.) 19, 20 (1846). The United States has not consented to suit on actions such as the amendment prays, whether such be viewed as one for garnishment or attachment, which it is, *Chilean Line, Inc. v. United States*, 344 F.2d 757, 759 (2d Cir. 1965), or for specific performance or injunction, *Romeo v. United States*, 462 F.2d 1036, 1037-38 (5th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973); *United States ex rel. Brookfield Const. Co. v. Stewart*, 234 F. Supp. 94, 97-98 (D.D.C. 1964), *aff'd* 339 F.2d 753 (D.C. Cir. 1964).

Prayer D would compel the Secretary to take the shipowner's property without due process. This is the problem in all attachment and garnishment actions. So far the Secretary and the two circuit courts have held the shipowner defendants entitled to all their subsidy, save

⁴ *Safir v. Kreps*, 551 F.2d 447 (D.C. Cir. 1977), *cert. denied*, 46 U.S. Law Week 3215 (1977).

only that which the Secretary will on demand declare forfeit. To compel him now to take, or hold, however temporarily, shipowners' property beyond that amount now on review would require him to do so before the courts have declared further forfeitures to be proper under the False Claims Act. Shipowners would therefore not have been accorded due process. Prayers C, E and F would not only compel the Secretary's manner of exercising his discretion, they would compel him to re-exercise his discretion contrary to that already exercised, and so far affirmed by the two circuits.

Safir has a plain and adequate remedy at law against the shipowners, as pleaded in 77 CIV 1093. Obviously, the federal defendants here have no function under the False Claims Act, and no interest in a False Claims Act recovery. The only federal officer who would have any functions or interest under the False Claims Act is the Attorney General. Safir could not force the Attorney General to act. The Attorney General has declined to act. (See copy of Declination of Appearance, App. 172). This is, of course, the whole reason why Safir has commissioned himself a private Attorney General. The "relief" which Safir therefore seeks then is merely to secure the judgment which some day he hopes to obtain against the shipowners. But as stated above, funds in federal hands are not subject to attachment, even if there were a New York State statute permitting attachment in advance of judgment. Safir merely has the problem every plaintiff has, that of collecting a judgment. He will have to get his judgment first, and worry later about collection.

Under the proposed amendment, Safir would compel the Secretary to perform a function which the Secretary does not have under the law. The federal defendants have no False Claims Act function. By statute they do not police the bona fides of claims, but only the conse-

quences of conduct regulated by the 1936 Act. None of the contractual language quoted in the original complaint by Safir requires the Secretary to obtain security against false claims, but only to secure compliance with the 1936 Act and operating differential subsidy and construction differential subsidy contracts. The contractual language which Safir quotes merely parrots the statute. To complete the circle, the 1936 Act, and therefore the contracts, have so far been held to vest discretion in the Secretary, which the Secretary has exercised (whether or not properly is still a question before the courts in the District of Columbia). Accordingly, the contractual and 1936 Act requirements are satisfied, and the federal defendants have discharged all the functions required of them by law. Thus, for all intents and purposes the action designated 68 CIV 643 is closed.

III

The lateness in urging this amendment taken together with all other factors to be considered preclude Safir from claiming the Court's liberality in amending.

The proposed amendments are sought over nine years after the original action was filed. This factor alone should cause the Court to deny the motion. Under Section 235 of 31 U.S.C., it is provided that, "Every suit shall be commenced within six years from the commission of the act, and not afterward." As interpreted, the time is not tolled by concealment. It is stated in *United States v. Borin*, 209 F.2d 145, 147 (5th Cir. 1954), *cert. denied*, 348 U.S. 821 (1954):

"The section is explicit in commanding that every such suit be commenced within six years from the commission of the act, *and not afterward*.

This emphatic language must have been employed with full recognition of the fact that in most cases the falsity of the claim would remain concealed for a long time. The intention seems clear that the time would not be extended on account of any fraud or concealment. See *Phillips v. Grand Trunk Western R. Co.*, 236 U.S. 662, 667, 35 S.Ct. 444, 59 L.Ed. 774; *United States ex. rel. Nitkey v. Dawes*, 7 Cir., 151 F.2d 639; *Damiano v. Pennsylvania R. Co.*, 3 Cir., 161 F.2d 534; Annotation, 15 A.L.R.2d 500; cf. *Grossman v. Young*, D.C.S.D.N.Y., 72 F. Supp. 375. We conclude that the claim based upon the False Claims Act was properly dismissed."

In Paragraph 25 of the amended complaint, Safir alleges that by 1972 all defendants knew that he "intended to exercise his rights" under the FCA. So then, why did he wait five years more to actually file suit? Under the statutory limitation he would have been required to file suit under the FCA at a much earlier date, at least after he had the benefit of the ruling by the Federal Maritime Commission in Docket 65-13, on December 12, 1967 (App. 3, 4).

Finally, several elements may be considered in determining whether to permit an amendment. Undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment are all factors which may affect the decisions. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The responsible agents of the federal defendants have dispatched their duties to the fullest within the framework of this action and the law. The proposed amend-

ments seeking to include a False Claims Act count introduce the element of fraud which has no identity within the context of proof required in 68 CIV 643 and should not be allowed.

CONCLUSION

For the reasons stated, the order of the district court entered December 20, 1977, denying plaintiff's motion to amend the complaint in 68 CIV 643 and consolidate with 77 CIV 1093, is correct and should be affirmed.

Respectfully submitted,

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STATE OF NEW YORK
COUNTY OF NEW YORK

ss.:

Patricia Miller

, ~~being duly sworn~~, deposes and says;

that deponent is not a party to this action and is over 18 years of age.

That on the 28th day of March 1978, deponent served the within

Brief for U.S. of America on behalf of Appellees

Robert J. Blackwell, et al.

upon the attorney(s) for the plaintiff-appellant-pro se

by depositing a true copy thereof securely enclosed in a franked wrapper, in a post office box regularly maintained by the United States Post Office Department at 26 Federal Plaza, in the Borough of Manhattan, City of New York, addressed to said attorney(s) as follows:

Mr. Marshall P. Safir

41 Flatbush Avenue

Brooklyn, New York 11217

that being the address designated by said attorney(s) for that purpose.

I verify under penalty of perjury that the foregoing is true and correct.

EXECUTED ON

~~Sworn to before me this~~

28th day of March, 1978.

Patricia Miller

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MAR 28 1978

KIRLIN, CAMPBELL & KEATING

